

United States District Court
District of Massachusetts

MICHAEL E. MONE,

Plaintiff,

v.

DEPARTMENT OF THE NAVY,

Defendant.

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) Civil Action No.
) 04-11009-NMG
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MEMORANDUM & ORDER

GORTON, J.

The present dispute arises from a request for information propounded by Attorney Michael E. Mone ("Attorney Mone") to the Department of the Navy ("the Navy") pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Attorney Mone seeks to obtain a report generated by the Navy which allegedly contains information germane to ongoing litigation he has commenced on behalf of clients for whom he claims damages for injuries allegedly suffered at the hands of the Navy. The Court has now reviewed the document in camera to determine whether it contains segregable, non-exempt information suitable for disclosure.

I. Factual Background

Attorney Mone represents several clients who were injured on January 5, 2002 on a field where the United States Marine Corps

was rehearsing a helicopter landing in preparation for a presidential visit. Attorney Mone filed suit on behalf of his clients against the Navy claiming damages under the Federal Tort Claims Act, 28 U.S.C. § 1346.

Discovery ensued and Attorney Mone made a FOIA request to the Navy for copies of all documents related to the event. On September 12, 2002, the Navy informed Mone that a "litigation report" ("the Report") had been prepared concerning the incident but that it would be withheld pursuant to 5 U.S.C. § 552(b)(5). Mone appealed that withholding but it was affirmed by a Deputy Assistant Judge Advocate General who held that the Report is exempt from disclosure because it consists of attorney work product and falls under the deliberative process privilege.

On May 19, 2004, Attorney Mone filed the instant action seeking judicial review of that denial. On August 20, 2004, the Navy moved for summary judgment and argued that the Report was protected by the attorney work product privilege and the deliberative process privilege.

On January 26, 2005, this Court entered a Memorandum and Order wherein it was stated that the Navy is entitled to invoke the attorney work product privilege with respect to the Report but that it remained unclear whether the entire document is privileged. Accordingly, the Court Ordered the Navy to produce the document for an in camera examination to determine whether it

contains segregable, non-exempt information.

II. Legal Analysis

Initially, the Court will clarify its Memorandum and Order dated January 26, 2005. Contrary to the Navy's assertion in its Motion for Reconsideration (Docket No. 12), this Court did not find that the "entire litigation Report was prepared as work product" nor did it exclude the possibility that the Report's pages may contain unprivileged, segregable factual material. Indeed, the existence of that possibility is precisely what warranted the in camera review.

The Court's statement that the Report "constitutes" work product was not intended to be understood to mean that it "consists entirely of" work product. In fact, the Court explicitly recognized the possibility that the Report might contain segregable material (which is necessarily unprivileged). See Judicial Watch, Inc. v. United States Dept. of Justice, 337 F.Supp.2d 183, 184-85 (D.D.C. 2004) (denying government motion for reconsideration in analogous situation). In any event, the Court determined that an in camera review of the Report was the most efficient way to resolve the matter.

A. Segregability Analysis

Pursuant to 5 U.S.C. 552(b), "any reasonably segregable portion of a record shall be provided to any person requesting

such record after deletion of the portions which are exempt". Unprivileged information may only be withheld if it is "inexorably intertwined with exempt portions" of the document. Schiller v. National Labor Relations Board, 964 F.2d 1205, 1209 (D.C. Cir. 1992). That requirement is designed to ensure that the government does not shield non-exempt information from disclosure simply by including it among privileged information.

Where the FOIA exemption under consideration is the attorney work product privilege, even purely factual material is often protected from disclosure because "an important part of what is protected by the privilege for attorney work-product is the attorney's consideration and weighing of the facts". Mervin v. Federal Trade Commission, 591 F.2d 821, 826 (D.C. Cir. 1978)(citing Hickman v. Taylor 329 U.S. 495, 511 (1947)). As such, it is often true that the "wide-reaching protection for attorney work-product runs headlong into FOIA's broad disclosure and segregability requirements." Judicial Watch, Inc., 337 F.Supp.2d at 186.

With these principles in mind, the Court has reviewed the Report in camera and has found that the majority of the information contained in it falls firmly within the scope of the attorney work product privilege, i.e. writings and analysis of

attorneys.¹ To the extent that the Report includes factual information, disclosure is unwarranted because that information is "inexorably intertwined" with Navy counsel's professional opinion of what evidence is (or is not) important to the litigation. Plaintiff is not entitled to such information. See Hickman, 329 U.S. at 511. Thus, the Report contains no segregable, non-exempt information and summary judgment will be allowed.

There is one aspect of the Report, however, that presents a less-obvious application of the attorney work product privilege and, therefore, warrants additional brief comment. The Report contains several verbatim witness statements taken by Navy counsel. Some courts have suggested that such material is not attorney work product because of its factual nature. See e.g. Mervin, 591 F.2d at 825 (D.C. Cir. 1978)(stating, in dicta, that "a government attorney may not protect a verbatim witness statement from disclosure . . . merely by including its text in a memorandum prepared for use in litigation").

On the other hand, other courts have held, in considering segregability under FOIA, that such "factual work product" may "sometimes be obtainable but only upon a showing of substantial

¹Unfortunately, the nature of the Report (i.e. a document containing privileged information) and the procedure (i.e. in camera review) dictates that the Court decline to describe its analysis in detail.

need and undue hardship." Hertzberg v. Veneman, 273 F.Supp.2d 67, 81 (D.D.C. 2003). An analogous view has been incorporated into the Federal Rules of Civil Procedure in the civil discovery context. See Fed.R.Civ.P. 26(b)(3).

The view enunciated in Hertzberg is persuasive in this case because there is no evidence that the plaintiff could not simply conduct witness interviews to obtain information relevant to his case. Accordingly, an intrusion by plaintiff into the Navy's litigation materials is unwarranted (under FOIA or in civil discovery) because it would be at odds with the principle that the attorney work product privilege seeks to protect. Hickman, 329 U.S. at 511 ("Were such materials open to opposing counsel on mere demand . . . [i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases").

ORDER

In light of the foregoing, the Navy's Motion for Summary Judgment (Docket No. 6) is **ALLOWED** and this case is **DISMISSED**.
So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated February 25, 2005